

Clean Water Act and Section 404 Jurisdiction

Section 404 Training

June 2015

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Overview

- The Clean Water Act context for Section 404
- What is needed for CWA Section 404 jurisdiction?
 - Discharge
 - Of dredged or fill material
 - From a point source
 - Into a water of the United States

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Broader CWA Context:

- **CWA Goal – Section 101(a):** Restore and maintain the chemical, physical, and biological integrity of the Nation's waters.
- **Section 301(a):** Except when in compliance with a permit, discharge of a pollutant from a point source into **navigable waters** is prohibited.
- **Navigable Waters – Section 502(7):** waters of the United States, including the territorial seas.

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Types of CWA Permits

- Section 402 – NPDES
 - Issued by EPA or authorized States
- Section 404
 - Issued by Corps or authorized States for dredged or fill material

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Definition of Discharge

- **Section 502(12):** Discharge of a pollutant means “any addition of any pollutant to navigable waters from any point source”
- Key Issue for 404 –
What is a discharge?

- **discharge of**
- a pollutant
- from a point source
- into WUS

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Definition of Pollutant

“...dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, etc.”
CWA Section 502(6)

- Key Issue for 404 –
- Is it fill material or waste?

- discharge of
- **a pollutant**
- from a point source
- into WUS

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What is a point source?

- Defined in CWA Section 502(14)
 - Discrete conveyance such as pipe, ditch, vessel
- Not normally an issue in 404 context



- discharge of
- a pollutant
- **from a point source**
- into WUS

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Current Issues in 404 Permitting

- Discharge of Dredged Material
- Fill Material

Section 404 regulates the discharge of dredged or fill material.

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Discharge of Dredged Material

Dredged Material - Material that is excavated or dredged from waters of the United States
33 CFR §323.2(c); 40 CFR §232.2

Also regulatory definition of **discharge of dredged material** - 33 CFR §323.2(d); 40 CFR §232.2

- This regulatory definition has changed over time

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Discharge of Dredged Material

- Pre-1993 – Regulations exempted *de minimus* discharges of dredged material
- 1993 Tulloch Rule – Regulated any redeposit of dredged material resulting from normal dredging, excavation, mechanized land clearing, etc.

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Discharge of Dredged Material

- 1999 Rule – Regulated redeposit except for incidental fallback
 - Incidental fallback left undefined
- 2001 Rule – Defined incidental fallback as a small amount of material falling back into substantially the same place
- 2007 – NAHB v. Corps – Invalidated 2001 Rule
 - Volume irrelevant, should focus on time material held and distance material moved before redeposit

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Tulloch Ditching



Discharge of Dredged Material

- 2008 Rule – Reestablishes 1999 Rule
 - Regulates redeposit of dredged material, except for incidental fallback
 - Incidental fallback left undefined
- How has this been implemented?
 - Discharge of incidental fallback determined on case-by-case basis
 - Distance
 - Time Held
 - Volume not a consideration.

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Fill Material

- Regulatory definition of “fill material” has evolved over time.
- Prior to 2002:
 - Corps: “Fill material” excludes discharges for the primary **purpose** of disposing of waste
 - EPA: “Fill material” includes discharges that have the **effect** of replacing navigable waters with dry land or changing the bottom elevation of a water for any purpose

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Fill Material

- Differing definitions of fill material gave rise to questions
- 404 vs. 402



Kayford Mountain in WV
Photo Credit: Jeff Gentner/AP

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2002 Fill Rule

- Joint final rule provided single definition of “fill material” – 33 CFR §323.2(e); 40 CFR §232.2
 - Has effect of:
 - Replacing any portion of a WUS with dry land
 - Changing the bottom elevation of any portion of WUS
 - Adds clarifying examples of fill material:
 - Rock, soil, clay
 - Plastics, construction debris
 - Mining overburden
 - Excludes trash/garbage

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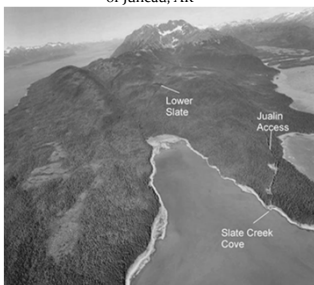
Fill Rule – 404 vs. 402

- Preamble to 2002 Fill Rule:
 - “EPA has never sought to regulate fill material under effluent guidelines”
 - Discharges subject to an ELG “will continue to be regulated under Section 402 of the CWA”
- Rule Language:
 - Silent on ELGs
 - Specifically calls out overburden from mining as fill material

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Kensington Gold Mine

Located approximately 45 miles north
of Juneau, AK



Lower Slate Lake is a 23.5 acre
subalpine lake

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Fill Rule – 404 vs. 402

- Issue: Is the Corps' authority to issue a 404 permit displaced by EPA's establishment of an effluent limitation or new source performance standard (NSPS) under section 402?
 - Discharge has the effect of fill
 - Zero discharge NSPS
- In other words: Is the mining slurry "fill material" addressed by a 404 permit, or a "waste" subject to an ELG and 402?
 - If regulated under 402, no discharge would be allowed

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Kensington Mine

- June 2009 – Supreme Court deferred to agency interpretation
- Discharge meets definition of fill material, so subject to 404 and need not meet NSPS



Lower Slate Lake, being used as a mine waste dump for the Kensington mine. Credit: Pat Costello
http://salsa.democracynaction.org/o/676/p/dia/action/public/?action_KEY=7146

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Review – When does Section 404 apply?

- Discharge
 - More than "incidental fallback"
- Of dredged or fill material
 - "Fill" rather than "waste"
- From a point source
 - Bulldozer or similar, or channelized
- Into a water of the United States

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Review Questions

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